No. 82-1474

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1983

CHARLES R. HOOVER, HOWARD H. KARMAN
ROBERT D. MYERS and HAROLD J. WOLFINGER
Petitioners,
vs.
EDWARD RONWIN,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I. IN GRADING BAR EXAMINATIONS, ARE MEMBERS OF THE ARIZONA SUPREME COURT'S COMMITTEE ON EXAMINATIONS AND ADMISSIONS ENGAGING IN "STATE ACTION" IMMUNE FROM FEDERAL ANTITRUST LIABILITY?

II. IN PETITIONING THE ARIZONA SUPREME COURT TO ADMIT NEW MEMBERS TO THE BAR, ARE MEMBERS OF THE COURT'S COMMITTEE ON EXAMINATIONS AND ADMISSIONS IMMUNE FROM ANTITRUST LIABILITY UNDER THE "NOERR-PENNINGTON" DOCTRINE?

OTHER PARTIES BELOW[1/]

[1/]Additional parties to this case in the Court of Appeals were as follows: James L. Richmond and George Read Carlock and D. Thompson Slutes were members of the Committee on Examinations and Admissions and stand in the same position as petitioners. The State Bar of Arizona was named as a defendant, as were the wives of each of the individual defendants (Wanda Carlock, Judith Myers, Jane Doe Wolfinger, Jane Doe Richmond, Jane Doe Slutes, Jane Doe Karman, and Jane Doe Hoover). The Court of Appeals affirmed dismissal of the complaint as to the State Bar and each of the wives. Ronwin v. State Bar of Arizona, 686 F.2d 692, 694 n. 1 (9th Cir. 1982).

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OPINIONS BELOW

The opinion of the Court of Appeals, as amended on rehearing, is published at 686 F.2d 692 and is reprinted as published in the Joint Appendix. (J.A. 96). The Court of Appeals' original decision, entirely superseded by the amendment on rehearing, is published at 1981-2

Trade Cas. (CCH) ¶ 64,414 and is reprinted in the Joint Appendix. (J.A. 29). The order and judgment of the United States District Court for the District of Arizona is unpublished and is reprinted in the Joint Appendix. (J.A. 23).

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its original judgment on December 14, 1981. (J.A. 29). A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was filed, and rehearing was granted on July 29, 1982.

A new judgment of the Court of Appeals was entered on September 8, 1982. (J.A. 96). A timely petition for rehearing and suggestion of appropriateness of rehearing en banc

was filed with respect to the new judgment. This petition was denied on December 2, 1982. (J.A. 172).

The petition for certiorari was filed within 90 days after December 2, 1982. The Order granting the petition was entered on May 16, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

United States Code, Title 15, Section 1 - Trusts, Etc., In Restraint of Trade Illegal...

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal....

Constitution of the State of Arizona, Arts. III & VI, § 1

Art. III - Distribution of Powers. The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this

Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

Art. VI, § 1. ...The judicial power ... shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts.

Arizona Revised Statutes

§32-261A. ...No person shall practice law in this state unless he is an active member of the state bar in good standing as defined in this chapter.

§32-213A. ...All persons admitted to practice in accordance with the provisions of this chapter shall, by that fact, become active members of the state bar.

§32-275. ...This chapter [regulating attorneys] shall not be construed to limit the supreme court's common law jurisdiction with respect to admitting and disciplining members of the bar of the supreme court.

Rules of the Arizona Supreme Court[1/]

Rule 28(a) - Examination and Admission. The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such

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[1/]The Rules are quoted as they read in February 1974.

purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court....The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions....The court will then consider the recommendations and either grant or deny admission.

Rule 28(c) I. No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules...

Rule 28(c) II. ...[A]ny person desiring to be admitted to the practice of law in the State of Arizona must file with the Secretary of the Committee on Examinations and Admissions ... a written application in substantially the following form:

Application for Examination...

Rule 28(c) IV. The committee shall consider and act upon the application within six months after it is filed, unless the time therefor is extended by an order of the Supreme Court. The mere filing of an application does not entitle the applicant to be examined by the Committee. No applicant will be examined until his application has been considered and acted upon and permission granted by the Committee to

take such examination. No such permission will be granted until it is established to the satisfaction of the Committee: ...

4. That he is mentally and physically able to engage in active and continuous practice of law; ...

Rule 28(c) VII A ...The Committee may utilize the Multi-State Bar Examination ... and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

Rule 28(c) VII B The Committee ... will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State ... results will be applied with the other portions of the total examination results. In

addition, the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

Rule 28(c) VIII A ...All applicants who receive a passing grade in the general examination ... and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar.

Rule 28(c) XII ...

REVIEW BY THE SUPREME COURT

An applicant aggrieved by any decision of the Committee....

(C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

may within 20 days after such occurrence file a verified petition with this Court for a review. The petition shall succinctly and briefly state the facts which form the basis for the complaint and applicant's reasons for believing this Court should review the decision of the Committee.... [T]his Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law. ... An applicant

aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination may ... file a petition with the Committee.... Upon receipt of such application the Committee ... shall informally review the same and make such review of the applicant's examination papers as the Committee believes to be necessary.... If two members of the Committee shall so dissent in writing from [a] majority decision [finding the grade to be fair], the applicant may file a petition with this Court for review of the entire examination ... and this Court shall in its discretion either grant or refuse such review.

STATEMENT OF THE CASE

Edward Ronwin ("Ronwin") filed a complaint in the United States District Court for the District of Arizona against petitioners in 1978. He alleged that petitioners "were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona; and, as such, presided over and conducted the process by which applicants for membership in said Bar were examined ..." (Complaint, J.A. 7-8, ¶ II). (Petitioners are referred to as "the Examiners" in this brief.)

Ronwin alleged that in conducting and grading the examination administered in 1974, the Examiners violated the Sherman Act "by artificially reducing the numbers of

competing attorneys in the State of Arizona...." (Complaint, J.A. 10-11, ¶ VII.) Ronwin asserted that consequently, he did not receive a passing grade on the examination, was denied entry to the Arizona bar, and was damaged in the amount of $400,000. (Complaint, J.A. 11-12, ¶¶ VII, IX.)

The Supreme Court's Examiners allegedly restricted admission by giving each applicant's examination paper a "raw score." Once these "raw scores" were known, the Examiners allegedly selected a particular "raw score" as the passing grade. According to Ronwin, the number of applicants who passed thus depended on the "raw score" chosen as a passing grade "rather than [on the] achievement by each Bar applicant of a

pre-set standard." (Complaint, J.A. 10, ¶ VI.)

Ronwin petitioned the Arizona Supreme Court to review his examination alleging, inter alia, violations of the federal antitrust laws. In an unreported decision, In re Petition of Ronwin, SB 52, the Arizona Supreme Court denied Ronwin's petition in an unreported decision and this Court denied his petition for a writ of certiorari. Ronwin v. Committee on Examinations and Admissions of the Supreme Court of Arizona, 419 U.S. 967 (1974). (J.A. 99).[1/] Respondent then filed this action.

[1/]The Committee on Examinations subsequently denied Ronwin's application to take the examination for a second time on the ground that respondent was mentally unable to engage in the practice of law. The
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The law considered by the courts below showed that Arizona has a clearly articulated affirmative policy restricting competition in legal services. Pursuant to those statutes and Arizona Supreme Court rules, no one may practice law unless he or she passes a bar examination. The Arizona Supreme Court, by its rules, mandates that its Committee on Examinations and Admissions shall devise a bar examination and select a grading system in the "Committee's discretion." The Committee then

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(continued from previous page) Committee's action, taken pursuant to Rule 28(c), was approved by the Arizona Supreme Court, and this Court again denied Ronwin's petition for certiorari. Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), cert. denied sub nom., Ronwin v. Special Committee on Examinations and Admissions of the Arizona Supreme Court, 430 U.S. 907 (1977) and Ronwin v. Supreme Court of Arizona, 439 U.S. 828 (1978) (two cases). (J.A. 99-100).

recommends admission to the Court and the Arizona Supreme Court orders or denies admission. Anyone aggrieved by the actions of the Committee can seek review from the Court. The text of these requirements are found at pages 5-12, supra.

Based on the above law, the district court dismissed Ronwin's complaint for failure to state a claim on which relief could be granted. (J.A. 23). The Court of Appeals for the Ninth Circuit reversed as to the Supreme Court's Examiners, but affirmed the dismissal of their wives and the Arizona State Bar. Two members of the panel of the Court of Appeals strictly applied the test of California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and held that

petitioners were not entitled to "state action" immunity from antitrust liability.[4/] Judge Ferguson dissented on the ground that the Examiners were state officials acting in their official capacity as the Supreme Court's Examiners and therefore were immune from antitrust liability. (J.A. 136-171).

[4/] The original opinion of the panel majority was published at 1981-2 CCH Trade Cas. ¶ 64,414. The Examiners' motion for rehearing was granted, the original opinion was withdrawn, and a new opinion, published at 686 F.2d 692, was issued. (J.A. 96). The amended opinion inter alia expressly recognizes that the Examiners were members of a committee of the Arizona Supreme Court, not of the Arizona State Bar. (J.A. 98). The later opinion nonetheless adheres to the thesis that the Examiners, as state officials, were not entitled to state action immunity under the Midcal test.

SUMMARY OF ARGUMENT

This case is only the third case to be addressed by this Court where the regulatory acts by state officials, as opposed to private conduct subject to regulation, are challenged under the federal antitrust laws. The facts presented in this case differ little from those of Parker v. Brown, 317 U.S. 341 (1943) and New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978). Pursuant to the clearly articulated affirmative policy of the Arizona Supreme Court to supplant competition in legal services with regulation, the Arizona Supreme Court's Committee on Examinations and Admissions devised and graded bar examinations. The Arizona Supreme

Court, acting in its sovereign capacity, had instructed its Committee to select a grading or scoring system which the Committee deemed "appropriate in its discretion." The grading of the examinations of which Ronwin complains was thus contemplated by Arizona's articulated policies.

In reversing the dismissal of the respondent's complaint, the Court of Appeals erroneously applied to state officials the "state action" test applicable to private conduct as summarized in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra. The Court of Appeals' decision was erroneous for three reasons.

First, this Court has never held that the strict Midcal test is

applicable to the conduct of state officials. Rather, this Court has consistently held that when purely state conduct is at issue, the test for state action immunity is whether the State has clearly articulated an affirmative policy designed to supplement competition with regulation and whether the state policy contemplated the challenged conduct. Furthermore, the principles of federalism underlying "state action" immunity do not permit antitrust liability to attach to state officials for enforcing a clear state regulatory scheme. When the State's own officials are engaged in the challenged conduct pursuant to state policy, there is no danger that private misconduct will be immunized

by a "gauzy cloak" of mere state approval. Both federalism and economic competition are preserved when state officials are immunized for acting pursuant to state policy. The regulatory policy of the Arizona Supreme Court and the conduct of its Committee on Examinations and Admissions meet that test.

Second, even if the Midcal test were applicable to the Examiners' conduct, that test was met here. The Arizona Supreme Court ordered its Committee to develop a test and examine applicants. It further instructed its Committee to develop a grading system in its discretion. The State of Arizona thus articulated a detailed and specific policy. It then actively supervised the implementation

of its policy as the rules of the Arizona Supreme Court provide for a review by that Court of a petition by an unsuccessful bar applicant. Arizona Supreme Court Rule 28(c). In fact, Ronwin utilized that procedure. In re Petition of Ronwin, supra; Application of Ronwin, supra. The Arizona Supreme Court has reviewed bar admission and discipline matters in many other cases, and indeed reserves the final decision on such matters to itself. This active state supervision is no different than the supervision this Court found "significant" in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

Finally, the Examiners' are immunized because their duties were to develop and grade an examination,

review an applicant's qualifications, and to recommend admission to the Arizona Supreme Court. Only the Arizona Supreme Court could order or deny admission. Such conduct is immunized by the Noerr-Pennington doctrine. Ronwin's complaint failed to allege (and could not allege) any conduct taking the duties and actions of the Examiners out of that exemption.

The Court of Appeals erred in reversing the dismissal of Ronwin's complaint. As the Examiners' alleged conduct met any and all tests for "state action" immunity and fell squarely within the protection of Noerr-Pennington, the Court of Appeals should be reversed and the district court's order reinstated.

ARGUMENT

I. IN GRADING BAR EXAMINATIONS, OFFICIALS OF THE ARIZONA SUPREME COURT ARE ENGAGED IN "STATE ACTION" IMMUNE FROM ANTITRUST LIABILITY.

A. As official action by the State, grading bar examinations is immune from antitrust liability.

In Parker v. Brown, supra, this Court held that the Sherman Act did not apply to a state program to restrict competition and restrain prices in the raisin market. There could be no antitrust action against the state officials who administered the program because the State, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." 317 U.S. at 352.

Parker v. Brown established that the Sherman Act is inapplicable to state action. The question presented in this case is whether the Arizona Supreme Court's Examiners, in grading bar exams pursuant to Arizona Supreme Court rules, were engaged in "state action" immune from federal antitrust liability.

While the scope of state action immunity for private persons and municipalities has been a recurrent question since Parker v. Brown,[1/] this case presents a simple

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[1/] E.g., Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Midcal, supra; Goldfarb v. Virginia State Bar, 421 U.S. 733 (1975); City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389 (1978) and Community Communications Co. v. City of Boulder, Colorado, 455 U.S. 40 (1982). While Bates v. State Bar of Arizona, supra, involved a state body, it addressed a prohibition of private conduct enforced by the State.

issue: whether state action immunity includes state officials acting in their official capacity. The Court of Appeals complicated this issue by testing the actions of the Arizona Supreme Court's Examiners as if they were private persons. The Court of Appeals thereby erred, for the test of state action is neither so complex nor so stringent for state officials as it is for private persons.

The Examiners argue that: (1) they are state officials; (2) the state action test for state officials is whether the State has clearly articulated an affirmative state policy to supplant competition with regulation; and (3) the Examiners meet the immunity test for state officials. The Examiners argue in the

alternative that they meet the stricter Midcal test even if they are considered to be private persons.

1. The Arizona Supreme Court's examiners are state officials.

Based upon the facts alleged in the complaint, the holding of the Court of Appeals, and relevant state law, the Supreme Court's Examiners are state officials.

The complaint alleges that petitioners "were all members of the Committee on Examinations and Admissions of the Supreme Court of Arizona; and, as such, presided over and conducted the process by which applicants for membership in said bar were examined . . ." (Complaint, J.A. 7-8, ¶2).

The Court of Appeals expressly recognized that the

Examiners were appointed by the Arizona Supreme Court pursuant to Rule 28(a), Rules of the Arizona Supreme Court and that the Committee was not an arm of the State Bar.[4/]

[4/] 686 F.2d at 697 (J.A. 98). Rule 28(a) provided in pertinent part:

> The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of five active members of the state bar shall be appointed by this court upon the recommendation of the board of governors of the state bar which shall recommend at least three members of the state bar for each appointment to be made... The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions heretofore adopted and made

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This part of the decision below is correct. The Court of Appeals had previously held that the Arizona Supreme Court's power to examine bar applicants had been delegated to the Committee. In Hackin v. Lockwood, 361 F.2d 499, 501 (9th Cir.), cert. denied 385 U.S. 960 (1966), the Court of Appeals held: "This [Committee on Examinations] is not a committee of the State Bar, but a committee named by the Supreme Court of Arizona, made up of members of the Arizona State Bar, Rule 28(a). Thus

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effective May 25, 1948, and as amended effective February 1, 1954, and such other rules as hereafter adopted. The court will then consider the recommendations and either grant or deny admission. (emphasis added).

The Court of Appeals thereby corrected its omission of this point in its earlier, superseded opinion, published at 1981-2 CCH Trade Cas. ¶ 64,414.

... the power to grant or deny admission is vested solely in the Arizona Supreme Court."

In addition, Articles III and VI, § 1 of the Arizona Constitution as well as Arizona Revised Statutes ("A.R.S.") § 32-275[1/] confirm that

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[1/]Ariz. Const., art. III, provides, that "The powers of the ... State of Arizona shall be divided into three separate departments, the Legislative, the Executive and the Judicial..." Article VI, § 1, provides that "The judicial power ... shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts." A.R.S. § 32-275 provides that "This chapter [regulating attorneys] shall not be construed to limit the supreme court's common law jurisdiction with respect to admitting and disciplining members of the bar of the supreme court." The Arizona Supreme Court has recognized its inherent power to allow or deny admission to the bar. Application of Courtney, 83 Ariz. 231, 319 P.2d 991 (1958).

this Court was correct in previously holding that the Arizona Supreme Court "is the ultimate body wielding the State's power over the practice of law" and its acts exercising this power are those "of the State acting as a sovereign". Bates v. State Bar of Arizona, supra.

Contrary to the assertion of the court below, (J.A. 103), the Examiners do not assert that the fact that they are state officials is alone dispositive of the state action question. That the conduct attacked as an antitrust violation is a state agency's or official's does affect the test for state action, however, as discussed in the next section of the Argument.

2. The state action test for state officials is whether the State has clearly articulated an affirmative state policy designed to supplant competition with regulation.

The Court of Appeals applied the Midcal test to determine whether the Supreme Court's Examiners were engaged in state action. (J.A. 106-107). The Midcal test requires that the challenged conduct be compelled by a clearly articulated state policy and be actively supervised by the State.

This Court has never held, however, that the Midcal test applies to state officials. Rather, this Court has consistently held that when governmental conduct is at issue, the test for state action immunity is whether the State has clearly

articulated an affirmative policy designed to supplant competition with regulation, and whether the policy contemplated the challenged action. New Motor Vehicle Board v. Orrin W. Fox, Co., supra; City of Lafayette, supra. Subjecting the Examiners to the more stringent test applicable to private persons undermines the principle of federalism underlying the state action doctrine. The test adopted by the court below ignores this Court's consistent statements that for state action purposes, the conduct of state officials is different from the conduct of private persons.

This Court's prior decisions and the federalism interests which they protect call for a different test

for official state conduct than that applied to private persons. State officials are immune from antitrust liability when: (1) they act pursuant to a clearly articulated state policy to replace competition with regulation and (2) the challenged actions are of the type contemplated by the state policy.[1/]

State action immunity for the acts of state officials was distinguished from purely private

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[1/]The Arizona Constitution provides that "the powers of the State of Arizona shall be divided into three departments, the Legislative, the Executive and the Judicial." Ariz. Const. art. III. It allocates to the Legislature, the Governor, and the Supreme Court the ultimate power of each branch. Ariz. Const. art. IV, § 1, art V, §4, and art. VI, §1. In this case, the policy was articulated by one of the repositories of ultimate state power, the Arizona Supreme Court. Bates, supra.

conduct in the first case to consider the matter. In Parker v. Brown, California had developed a raisin marketing program. The program was initiated by producers, but had to be approved by a state commission. Thus, the Commission's acts, not private conduct, restricted competition. This Court held that California's regulatory program was pursuant to "legislative authority" and as such was an act of the "state itself." 317 U.S. at 352. Since the Sherman Act was a "prohibition of individual [restraint] and not state action," the Act "did not undertake to prohibit" the program even though it had anti-competitive effects. 371 U.S. at 352. Under such circumstances, the federal courts defer to the State's regulation.

Parker itself was premised upon the proposition that the Sherman Act "was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." Goldfarb v. Virginia State Bar, 421 U.S. at 788. Understandably, different standards govern private conduct than acts by state officials to ensure that the Act is applied as intended to the one but not the other.

The instant case is illuminated most by New Motor Vehicle Board v. Orrin W. Fox Co., supra. State statutes permitted local automobile dealers to protest the establishment of new car dealerships. A hearing was then held before a state board which could preclude new dealers

from entering the market. This Court found such conduct immune as "state action" because the State had clearly articulated a policy to supplant competition with regulation. Justice Brennan noted for the majority:

> The dispositive answer is that the Automobile Franchise Act's regulatory scheme is a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships. The regulation is therefore outside the reach of the antitrust laws under the "state action" exemption. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943); Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977). See also City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

439 U.S. at 109.

The Court also held that for state agencies, as for cities, the

policy need not be detailed or compelling.[1/] (Citing Lafayette, supra.) Rather, as stated in Lafayette, 435 U.S. at 415,

> This does not mean, however, that a political subdivision must be able to point to a specific detailed legislative authority ... while a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such ... an adequate state mandate for anti-competitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." [citations and footnote omitted]

This Court has pointedly differentiated immunity for the acts

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[1/] The Court did not need to address whether active state supervision was required to immunize the board's actions. As here, the board's actions were that of the State itself and supervision would have been superfluous. This point is discussed infra.

of state agencies from immunity for the acts of others. For example, Bates v. State Bar of Arizona, supra, distinguished Cantor v. Detroit Edison Co., supra, as involving a private defendant, an electric utility:

> [T]he context in which Cantor arose is critical. . . . [O]bviously, Cantor would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party. Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. . . . Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision.

433 U.S. at 361 (footnote omitted).

The duality of the state action doctrine was recently confirmed

by this Court in Community Communications Co., Inc. v. City of Boulder, Colorado, supra. The Court there observed that conduct is immune if it is either action of the State itself or if a sufficient connection is demonstrated between the challenged conduct and state authority:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See City of Lafayette, Orrin W. Fox Co., and Midcal.

455 U.S. at 52 (emphasis added).

The distinction has been applied specifically to regulation of the bar. The Courts of Appeals have approved state action immunity for bar regulators without the degree of

scrutiny applied to private persons. E.g., Princeton Community Phone Book, Inc v. Bate, 582 F.2d 706 (3d Cir.), cert. denied 439 U.S. 966 (1978); Foley v. Alabama State Bar, 648 F.2d 355 (5th Cir. 1981); see also Feldman v. Gardner, 661 F.2d 1295 (D.C. Cir. 1981), cert. denied sub nom., Feldman v. District of Columbia Court of Appeals, ____ U.S. ____, 102 S.Ct. 3483 (1982), vacated on other grounds sub nom., District of Columbia Court of Appeals v. Feldman, ____ U.S. ____, 103 S.Ct. 1303 (1983) (two cases) (regulation by District of Columbia Court of Appeals).

States can act only through their officers and agencies. State action immunity would mean little if it protected only the State of Arizona and not its officials. This Court

recognized that fact in Parker, observing that the Sherman Act was not intended "to restrain a state or its officers or agents from activities directed by its legislature" and noting that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Parker v. Brown, 317 U.S. at 350-351 (emphasis added).

The federalism notions which underlie Parker v. Brown support more generous antitrust immunity for state officials than for private persons. Parker was concerned with preserving our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority..." Parker, 317

U.S. at 351. This Court recently reaffirmed that "immunity for state regulatory programs is grounded in our federal structure." Midcal, 445 U.S. at 103.[10/]

[10/]The concern for federalism is intensified when the challenged state action is the traditional and fundamental role of the States in regulating the bar. "[T]he States have a compelling interest in the practice of professions . . . [and] they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Goldfarb, 421 U.S. at 792. "[T]he regulation of the activities of the bar is at the core of the State's power to protect the public." Bates, 433 U.S. at 361. This Court recognized that this makes a difference in state action analysis: "Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in Cantor." Bates, 433 U.S. at 362 (footnote omitted). Whether regulation of the bar, as an

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The cases decided since Parker have focused on whether private anti-competitive conduct was compelled by a state regulatory scheme. Private parties are immune when subjecting them to pro-competitive federal antitrust law would jeopardize the State's regulatory effort by discouraging compliance with inconsistent state regulations.

(continued from previous page) "integral" and "traditional" State function, City of Lafayette, 435 U.S. at 423-424 (Burger, C.J., concurring), is immunized from antitrust liability by the Tenth or Eleventh Amendments need not be reached. Because state action immunity supported by general notions of federalism is available, the potentially substantial and difficult issue of whether antitrust liability violates specific constitutional guarantees to the States need not be decided. See Goldfarb, 421 U.S. at 792, n. 22 (Eleventh Amendment issue not reached, but left open on remand). See generally National League of Cities v. Usery, 426 U.S. 833 (1976).

Sherman Act liability for regulated private conduct indirectly undermines State power by undercutting the effects of its actions. Liability for the regulatory acts of State officials, on the other hand, directly impairs the acts of a sovereign and thereby injures its capacity to govern. Thus, immunity for state officials is more important to our federal system than immunity for private, though regulated, enterprises.

The reasons for a more stringent state action test for private persons are also absent from cases involving official conduct pursuant to a clearly articulated state policy. Midcal's stricter requirements, while preserving state action immunity, are designed to

prevent private parties from acquiring immunity for their anti-competitive actions under "a gauzy cloak of state involvement." Midcal, 445 U.S. at 106. Midcal is thus an accommodation of the potentially conflicting interests in preserving federalism and promoting antitrust policy.

Without meaningful state involvement in the challenged conduct, antitrust immunity for private persons is unnecessary for there is little fear in such a case that antitrust liability would infringe upon the power or acts of the State. When conduct by private persons is challenged, the courts rightly demand some assurance that state action immunity will promote federalism and not merely shield private misdeeds.

That assurance is substantial state involvement in the challenged conduct, and Midcal specifies the degree of involvement required.

The need for an assurance of intimate state involvement is superfluous, however, if the anti-competitive acts are the regulatory efforts of a State agency or official and not a private person. In that case, private misconduct is not shielded because the only anti-competitive conduct being immunized is the State's own regulatory acts. And, since the policy authorizing the conduct has been expressed by "the State itself" through the Legislature, Governor or Supreme Court, the courts are assured that antitrust policies are not being sacrificed for doubtful reasons.

Applying Midcal to state officials acting pursuant to state policy is also unnecessary, illogical and unwise. It is unnecessary because a state agency or official acting pursuant to a clearly articulated state policy is restrained from anti-competitive misconduct by the existence of the state policy and authorization for the official to act. Federal antitrust review of state action is unnecessary because the States review their officials' actions for consistency with state law and policy. Areeda, "Antitrust Immunity for 'State Action' after Lafayette," 95 Harv. L. Rev. 435, 454 (1981). See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (affirming state court review

of statute authorizing restraints on competition); Llewellyn v. Crothers, 1983-1 CCH Trade Cas. ¶ 65,358, at 70,138 (D. Ore. 1983) (state supervision in its own regulatory review invalidated adjustment of medical payments).

Requiring state supervision of state conduct is also illogical and unwise. Who would supervise the state agency or official? Does an agency simply supervise itself? "To ask if the state controls and reviews the DOT [State Department of Transportation] is to simply ask if the state exercises control over and governs its own actions. The tautology is complete. The DOT, as an agent and instrumentality of the state, is controlled and reviewed constantly by

the state." Deak-Perera Hawaii, Inc. v. Department of Transportation, 553 F.Supp. 976, 988-9 (D. Haw. 1983). Alternatively, active supervision of a state official or agency by the "State" would require that the ultimate repositories of state power -- the state legislatures, governors, and supreme courts -- constantly monitor each decision and act of their subordinates to ensure strict compliance with state policy. This is simply an impractical and unreasonable expectation. Such a rule invites rather than discourages antitrust actions against the States.

If Midcal were strictly applied to state agencies, the antitrust laws would make any delegation of state regulatory

functions to state agencies meaningless. If, for example, the Arizona Supreme Court had to compel and supervise specific grading procedures, it would have to decide such matters as whether 69 as opposed to 70 would be a passing grade; whether a grading "curve" could be permitted; how many persons would pass; what questions and answers should be; what examination time limits would be, and all other details of the examinations process.[11/]

The Arizona Supreme Court, like every other state judiciary, has

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[11/] Indeed, Ronwin pointed to those aspects of the examination in his petition to the Arizona Supreme Court to review the 1974 examination.

delegated such examination duties to bar examiners while retaining ultimate authority over admissions. S. Duhl, The Bar Examiners' Handbook 15-16 (2d ed. 1980); F. Klein, S. Leleiko & J. Marity, Bar Admission Rules and Student Practice Rules 30-33 (1978). Antitrust liability would effectively prevent the courts from delegating these tasks. The courts would be overwhelmed by the work required to examine each applicant thoroughly. At worst, the Arizona Court's ability to screen bar applicants would be debilitated; at the very least, the critical capacity of the examination would suffer, depriving state courts of their best tool to assure lawyer competence at a time of widespread concern about the quality of

lawyering.[11/]

It would also be anomalous to apply a stricter "state action" standard for state agencies than for cities and municipalities. Cities and other subordinate governmental units are immunized if they act pursuant to a clearly articulated affirmative state policy aimed at supplanting competition with regulation. Community Communications Co. v. City of Boulder, supra; City of Lafayette, supra, (plurality opinion). There is

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[11/] E.g., Burger, "The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?", 42 Fordham L.Rev. 227 (1973); Maddi, "Trial Advocacy Competence: The Judicial Perspective", A.B.F. Research J. 105 (1978); Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Courts, reprinted at 83 F.R.D. 215 (1979).

no requirement that the State compel conduct for cities to act or that the state policy be detailed and specific. See City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415 (plurality); Community Communications Co., Inc. v. City of Boulder, supra at 51; Town of Hallie v. City of Eau Clair, 700 F.2d 376 (7th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3842 (U.S. May 11, 1983) (No. 82-1832); Gold Cross Ambulance Serv., Inc. v. City of Kansas City, 1983-1 CCH Trade Cas. ¶ 65,339 at 70,017-70,019 (8th Cir. 1983); Hybud Equip. Corp. v. City of Akron, 455 U.S. 931 (1982), on remand 1983-1 CCH Trade Cas. ¶ 65,356, at 70,119 - 70,120 (N.D.Ohio 1983); Cent. Iowa Refuse Systems, Inc. v. Des Moines Met. Area Solid Waste Agency,

557 F. Supp. 131 (S.D. Iowa 1982). In addition, this Court has expressly reserved the question of whether the active supervision requirement should apply to cities. Community Communications Co. v. City of Boulder, 455 U.S. at 51-2, n. 14.[11/]

In sum, considerations of federalism require a different test for state action by state officials and agencies. The States have an historic and important role in economic regulation, especially in regulating the professions. When the State has expressed its policy to regulate rather than allow unbridled

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[11/] A number of lower courts have held that such supervision is not required. Town of Hallie v. City of Eau Claire, supra; Gold Cross Ambulance Serv. v. City of Kansas City, supra, at 70,021-70,022; and Hybud Equip Corp. v. City of Akron, supra at 70,121-70,122.

competition, federal antitrust law should not restrict state officials acting under the authority of the State's policy. Instead, state action immunity permits the States to carry out their governmental tasks.

3. The Arizona Supreme Court's examiners meet the "state action" immunity test for state officials.

The Examiners' actions in grading Ronwin's bar examination easily meet the test for state action immunity. They acted as state officials under a clearly articulated state policy to supplant competition in legal services with regulation.

Arizona has a comprehensive system of regulation of the bar. The Arizona Supreme Court's Rule 28(c), at issue in this case, is only a part of that system. State law forbids the

practice of law by persons not admitted to the bar by the Arizona Supreme Court. A.R.S. §§ 32-261, 213 and Rule 28(c).[14] Pursuant to the Arizona Supreme Court's power to regulate bar admission,[15] it delegated the administration and grading of bar examinations to its Committee on

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[14]The relevant portions read as follows:

"§32-261A. No person shall practice law in this State unless he is an active member of the state bar in good standing as defined in this chapter."

"§32-213A. All persons admitted to practice in accordance with the provisions of this chapter shall, by that fact, become active members of the state bar."

"Rule 28(c)I. No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules. . . ."

[15]See Application of Courtney, supra (inherent power) and A.R.S. § 32-275 (statutory authorization).

Examinations and Admissions. Rule 28(a). The Arizona Supreme Court delegated some measure of discretion to its Examiners to grade the examinations. Arizona Supreme Court Rule 28(c), applicable to the exam in question read, in pertinent part:

VII.

A. ...The Committee may utilize the Multi-State Bar Examination...and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

B. The Committee...will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied...In addition, the committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

VIII.

A. ...All applicants who receive a passing grade in the general examination...shall be recommended for admission to the Bar... (emphasis added).

The regulatory scheme here is no different than that approved by the Court in Parker v. Brown. See also discussion of Bates v. State Bar of Arizona and Midcal, infra. In Parker, a committee of private persons formulated the program. The state commission then had to approve the program if it found "that 'the program is reasonably calculated to carry out the objectives of this act.'" 317 U.S. at 347. Here, the Examiners have similar discretion to develop the exact questions and the grading formula to be used. Rule 28(c). As did the California program involved in Parker, the Arizona statutes and Supreme Court rules establish a clearly articulated regulatory policy which contemplated the action taken by the Examiners. See also Euster v.

Eagle Downs Racing Ass'n, 677 F.2d 992 (3d Cir. 1982), cert. denied sub nom., Euster v. Pennsylvania Horse Racing Comm'n., ____ U.S. ____, 103 S.Ct. 388 (1982) (broad discretion given regulatory commission to exact rules and set fees satisfies "state action" test for state officials).

In sum, Arizona clearly articulated a policy supplanting competition with regulation. That policy contemplated the actions of which Ronwin complains. The Committee was authorized to grade the examination in its discretion. The existence of such policy is sufficient to render the members of the Arizona Supreme Court's Committee on Examinations and Admissions immune: grading the examinations was contemplated by

Arizona's clearly articulated affirmative policy to displace competition in legal services with regulation.

B. As private conduct, grading bar examinations is immune because it meets the Midcal test.

Even if the Court should determine that the stricter version of the Midcal test for private persons should be applied to the state officials here, the Examiners are also immune from antitrust liability under that test.

Midcal requires that for immunity to exist, the conduct complained of must be compelled by a clearly articulated affirmative state policy and be actively supervised by

the State. Arizona clearly articulated an affirmative state policy concerning admission to the bar including a specific and affirmative policy on grading bar examinations. Arizona actively supervised the grading through both the Arizona Supreme Court and its Committee on Examinations and Admissions.

In this case, "the challenged restraint" was no less clearly expressed as Arizona's policy than in other cases applying the Midcal test to private conduct. The Arizona Supreme Court clearly articulated Arizona's policy to restrict competition in legal services by limiting admission to the bar. The Court ordered its Committee on Examinations and Admissions to develop and grade a bar examination to effect

this policy. Arizona Supreme Court Rule 28.[15/]

[15/]The pertinent provisions of the Arizona Supreme Court's rules read as follows:

> Rule 28(a): ... [A] committee on examinations and admissions ... shall be appointed by this court ... The committee shall examine applicants ...
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> Rule 28(c) I: No person shall practice law in the State of Arizona without being admitted to the Bar by compliance with the following rules...
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> Rule 28(c) IV: The committee shall consider and act upon the application within six months after it is filed, unless the time therefor is extended by an order of the Supreme Court. The mere filing of an application does not entitle the applicant to be examined by the Committee. No applicant will be examined until his application has been considered and acted upon and permission granted by the Committee to take such examination. No such permission will be granted until it is established to the satisfaction of the Committee: ...

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Arizona's policy of regulating admissions to the bar by administering examinations is no

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4. That he is mentally and physically able to engage in active and continuous practice of law; ...

Rule 28(c) VII A: ...The Committee may utilize the Multi-State Bar Examination ... and may utilize such grading or scoring system as the Committee deems appropriate in its discretion.

Rule 28(c) VII B: The Committee ... will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State ... results will be applied with the other portions of the total examination results. In addition, the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination.

Rule 28(c) VIII A: ...All applicants who receive a passing grade in the general examination ... and who are found to be otherwise qualified under these Rules shall be recommended for admission to the Bar. (Emphasis added)

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different than other state policies which have satisfied the Midcal "state action" test. In Midcal itself, the California statute in question provided that each private wine grower or wholesaler "...shall: (a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract... (b) Make and file a fair trade contract and file a

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Prior to January, 1974, when Rule 28(c) was amended, (Arizona Legislative Service 1974 at 93 (January 15, 1974)), Rule 28(c) VIII required a "grade of seventy or more in the general examination" to be recommended for admission to the bar. That requirement was deleted beginning with the February 1974 examination And Rule 28(c) VII allowing the Committee's discretion in grading was substituted. See the affidavit of the Clerk of the Arizona Supreme Court attached to the Examiners' Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc filed with the Court of Appeals in January 1982.

schedule of resale prices, if he owns or controls a brand of wine..." (emphasis added). 445 U.S. at 99, n. 1. In addition, no wine merchant was permitted to sell wine to a retailer at any other price other than as set by the resale price schedule or fair trade contract. Id. at 99. Finally, state regulations provided that the prices posted "by a single wholesaler within a trading area bind all wholesalers in that area." 445 U.S. at 100.

Justice Powell, speaking for a unanimous court,[17] wrote:

> The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance.

445 U.S. at 105.

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[17] Justice Brennan did not participate, however.

Despite the fact that California did not set or require any particular prices but only permitted private persons to post rates, its regulatory scheme sufficiently expressed a state policy to permit resale price maintenance. Similarly, the Arizona Supreme Court did not set the precise grading procedure for bar examinations. It established a system which required examinations and ordered the Examiners to set the exact standard. Arizona's regulatory program clearly indicates that Arizona adopted a policy to limit competition in the practice of law to those who have passed an examination.

Bates v. State Bar of Arizona, supra, also demonstrates that Arizona's policy has been clearly enunciated. In Bates, the regulation provided that "A lawyer shall not

publicize himself, or his partner, or associate ... or his firm, as a lawyer through newspaper or magazine advertisements...." 433 U.S. at 355. The Court found that the regulation itself clearly revealed a state policy: "The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior..." 433 U.S. at 362.

The decision of the Court of Appeals in this case also conflicts with that a previous decision of that Court. In Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272 (9th Cir. 1982), the court held that statutes conferring the power on a board to regulate the admission to the practice of dentistry including examinations, but which did not "lay down all the requirements" imposed by

the board, met the first part of the Midcal test. 673 F.2d at 275 and 276, n. 8.

The second part of the Midcal test -- active state supervision -- was also met in this case. Pursuant to Arizona Supreme Court Rule 28(c)XII,[11/]

[11/]That rule provides two procedures. First,

> [A]n applicant aggrieved by any decision of the Committee....
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> (C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;
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> may within 20 days after such occurrence file a verified petition with this Court for a review. The petition shall succinctly and briefly state the facts which form the basis for the complaint and applicant's reasons for believing this Court should review the decision of the Committee.... [T]his Court shall consider the papers so filed together with the petition and response and make such order, hold

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unsuccessful bar applicants may petition the Arizona Supreme Court to review the circumstances of the

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> such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law....
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> Second,
>
> [a]n applicant aggrieved by the failure of the Committee to award said applicant a satisfactory grade upon an examination may ... file a petition with the Committee.... Upon receipt of such application the Committee ... shall informally review the same and make such review of the applicant's examination papers as the Committee believes to be necessary.... If two members of the Committee shall so dissent in writing from [a] majority decision [finding the grade to be fair], the applicant may file a petition with this Court for review of the entire examination ... and this Court shall in its discretion either grant or refuse such review.

examination and other action by the Committee. Indeed, Ronwin petitioned from this examination and the later finding that he was unable to practice law. At that time, he raised antitrust claims being resurrected in this action. In re Petition of Ronwin, supra; Application of Ronwin, supra.

The Arizona Supreme Court has actively pursued its "supervisory" role in bar matters. E.g., Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964). Historically, the Court has not always accepted its Committee's recommendations. E.g., Application of Levine, supra; Application of Klahr, 102 Ariz. 529, 433 P.2d 977 (1967); Application of Guberman, 90 Ariz. 27, 363 P.2d 617 (1961); Application of Courtney, supra.

Arizona's supervision in this case is no less active than that referred to in Bates. There, this Court held that

> [T]he rules are subject to pointed re-examination by the policymaker --the Arizona Supreme Court--in enforcement proceedings...we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active.

433 U.S. at 362.

Thus, the Examiners are immune even if they are private persons subject to the Midcal test. They acted pursuant to a clear state policy to limit admission to the bar. Their actions are compelled by the Arizona Supreme Court and actively reviewed by the Arizona Supreme Court. The Examiners are thus immune from antitrust liability, and the

holding to the contrary by the Court of Appeals must be reversed.

II. IN PETITIONING THE ARIZONA SUPREME COURT TO ADMIT NEW MEMBERS TO THE BAR, PETITIONERS ARE IMMUNE FROM ANTITRUST LIABILITY UNDER THE "NOERR-PENNINGTON DOCTRINE.

In addition to the "state action" doctrine, a separate but related doctrine exempts the Examiners from antitrust liability. The Noerr-Pennington doctrine immunizes concerted efforts to obtain and influence government action. Such immunity protects the Examiners' petitions to the Arizona Supreme Court that it grant or deny admission to the bar.

In Eastern R.R. Presidents Conference v. Noerr Motor Freight,

Inc., 365 U.S. 127 (1961), a group of railroads combined in a publicity campaign to "foster the adoption and retention of laws and law enforcement practices destructive of the trucking business..." 365 U.S. at 129. This Court reversed the judgment for the plaintiffs on the basis that

> [N]o violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws.... [T]he Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations..." Accordingly ... where a restraint upon trade ... is the result of valid governmental action ... no violation of the Act can be made out.

365 U.S. at 135-136 (emphasis added).

From that starting point, the Court held that combinations to persuade or influence governmental action which would produce a restraint or a monopoly were also not unlawful.

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together ... to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136.

As later summarized by this Court in California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972), the Court's ruling in Noerr meant that

> [N]o cause of action was alleged insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement.

404 U.S. at 510.[13/]

[13/]The two fundamental bases for this ruling were summarized in Motor Transport as follows:

> (1) "In a representative democracy such as this, these branches of government act on behalf of the people and, to a

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In applying this immunity to the facts presented in Noerr, the Court found that all of the efforts by the defendants were directed at the passage of laws to injure the plaintiffs. The Court held that

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> very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." [citations omitted]
>
> (2) "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." [citations omitted]

404 U.S. at 510.

defendants' conduct was immunized even though the defendants' intent was "to hurt the truckers in every way possible..." 365 U.S. at 142. As the Court held in Noerr, where there was no direct attempt to persuade persons not to deal with the plaintiffs, the acts to influence government action were immune even though the plaintiffs might have "sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action..." 365 U.S. at 143.

The Court in Noerr immunized genuine attempts to influence governmental action even where the result might be a restraint of commerce and a competitor might be directly injured. This principle was applied to attempts to seek

administrative action in United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) and to the institution of lawsuits in Motor Transport, supra.

The Noerr-Pennington doctrine applies to the Examiners' acts as alleged in Ronwin's complaint. Arizona Supreme Court Rule 28(a) creates a duty that the Examiners ask the Court to grant or deny admission to each applicant:

> [T]he committee shall examine applicants and recommend to this court for admission to practice applicants [who are qualified].... The court will then consider the recommendations and either grant or deny admission.

The Examiners' role is to recommend applicants for admission; the Arizona Supreme Court grants or denies admission.

Ronwin's allegations are consistent with the role prescribed

for the Examiners by Rule 28(a). For example, Ronwin alleges that the Committee "presided over and conducted the process by which applicants for membership ... were examined ... so as to permit a decision on whether or not applicants were to be admitted to said Bar." (Complaint, J.A. 7-8, ¶ II).

The Examiners' actions in recommending to the Arizona Supreme Court that it deny Ronwin's admission to the bar falls within the Noerr-Pennington exemption for two reasons. First, the Examiners' action did not injure Ronwin. They did not have the power to admit or deny his admission. Only the Arizona Supreme Court has such power. Thus, as this Court stated in Noerr, 365 U.S. at 136, "[W]here a restraint upon trade ... is the result of valid

governmental action ... no violation of the Act can be made out." Accord, Cow Palace, Ltd. v. Associated Milk Producers, Inc., 390 F.Supp. 696 (D.Colo. 1975); In re Airport Car Rental Antitrust Litigation, 521 F.Supp. 568 (N.D.Cal. 1981), aff'd on other grounds, 693 F.2d 84 (9th Cir. 1982). If Ronwin was injured, it was by the valid act of the Arizona Supreme Court. The Examiners' attempts to influence that decision did not cause any "injury of the type the antitrust laws were intended to prevent...." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Second, the Examiners' conduct was not intended to achieve anything but governmental action. Ronwin did not allege that the

Examiners directly interfered with his contracts or competitive advantage. Rather, the Examiners only undertook action they were allowed and indeed required to do by law: recommend persons for admission by the Arizona Supreme Court.[10/]

Nor could Ronwin have alleged sufficient facts to take the conduct complained of out of the Noerr-Pennington immunity under the sham exception. The sham exception is based on allegations that the concerted effort was not to influence

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[10/] The fact that they were a governmental entity charged with the authority to recommend licensure should make no difference as to the interests served by the Noerr-Pennington doctrine. The doctrine has been applied to a professional licensing board. Bank Bldg. & Equip. Corp. of Am. v. Nat'l Council of Architectural Registration Boards & W. Virginia Board of Architects, 1975 CCH Trade Cas. ¶ 60,108 at 65,229 (D.D.C. 1975).

governmental action but only to directly restrain trade. As Professor Handler has explained,

> [T]he California Motor Transport Co. plaintiffs carefully refrained from basing their cause of action upon any actual attempt to influence the course of administrative action. When the defendants met in February of 1961 they had no knowledge of the merits of any future application. All they knew was that the California PUC had traditionally adopted a liberal approach with respect to granting new operating rights, but according to plaintiffs' assertions, defendants specifically eschewed any attempt to change this agency attitude. The plan was not to influence government, but rather to deter competitors from making applications that would set the public decision-making apparatus into motion. Such a scheme, if proven, would be embraced by the sham exception since it involved nothing more than a direct restraint on competitors.

Handler, "Twenty-Five Years of Antitrust, "73 Colum.L.Rev. 413, 436-437 (1973).

In contrast to Motor Transport, Ronwin did not and could not allege that the actions were "to

harass and deter [respondent] in [his] use of administrative and judicial proceedings so as to deny [him] 'free and unlimited access' to those tribunals." Motor Transport, 404 U.S. at 511. Nor did he allege that an abuse of process has barred him from access to neutral review. 404 U.S. at 513.

Ronwin has not alleged that the Examiners' recommendations to the Arizona Supreme Court were a sham. Nor can he successfully amend his Complaint to so allege.[11/] Based

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[11/] Even if he could, he should not be permitted to so amend. Permitting Ronwin to amend would have a chilling effect on the Examiners' First Amendment rights and fulfilment of their duties under Arizona law. Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177, n. 8 (10th Cir. 1982) and Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977).

upon Ronwin's repeated suits to have the courts overturn the Committee's recommendations as well as the Arizona laws under which the Examiners acted, he cannot fairly allege a deprivation of access to the judiciary. The Examiners' only acts involved their duties to examine applicants to the bar so as to recommend applicants for bar admission to the Arizona Supreme Court. In addition, Ronwin has had access to the courts. He has petitioned the Arizona Supreme Court for review of the February, 1974 examination and the finding of the Committee that he was unqualified to take the July, 1974 examination. In re Petition of Ronwin, supra; Application of Ronwin, supra. Those petitions were denied as were Ronwin's petitions for writs of certiorari to this Court. Ronwin v. Comm. on

Examinations, supra; Application of Ronwin, supra. Ronwin has thus applied for relief. The fact that he failed to obtain relief is not significant: "Free access to the courts does not mean unopposed access." Wilmorite, Inc. v. Eagan Real Estate, Inc., 454 F.Supp. 1124, 1135 (N.D.N.Y. 1977), aff'd without opin., 578 F.2d 1372 (2d Cir. 1978), cert. denied, 439 U.S. 983 (1978); Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers, supra.

Finally, while not determinative, the fact that Ronwin has been unsuccessful in seeking review is indicative that the Examiners have genuinely attempted to seek governmental action and not attempted an illicit restraint of

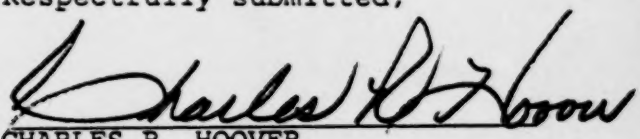
trade. Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Subscription Television, Inc. v. S. California Theater Owners Ass'n, 576 F.2d 230 (9th Cir. 1978)

If injured at all, Ronwin was injured only by governmental action and not by any direct personal act by the Examiners. Ronwin alleged nothing more than that the Examiners attempted to influence action by the Arizona Supreme Court. Such efforts are immune from antitrust liability under the Noerr-Pennington doctrine. The Court of Appeals should have affirmed the dismissal of the complaint on this basis.

CONCLUSION

For the reasons stated above, the order and opinion of the United States Court of Appeals for the Ninth Circuit should be reversed and the order and judgment dismissing respondent's complaint should be reinstated.

Respectfully submitted,



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August 15, 1983